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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-308

No. ~~1853~~

KARL T. FELDMAN,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY

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KENNETH F. KUNZMAN
On the Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

KARL T. FELDMAN,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY

Petitioner Karl T. Feldman respectfully prays that a Writ of Certiorari issue to review the judgment of the Superior Court of the State of New Jersey, Middlesex County, entered December 8, 1969. Petitioner sought dismissal of an indictment brought by the State of New Jersey on the grounds he was being placed twice in jeopardy.

Opinion Below

The opinion below is unreported and is attached (8a-15a). Leave to appeal that judgment was denied by or-

der of the Appellate Division of the Superior Court on January 15, 1970. The Supreme Court of New Jersey, after oral argument, stayed all further proceedings by order dated April 15, 1970 but subsequently on March 22, 1971 denied defendant's motion for leave to appeal.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

1. May a person be prosecuted in the state courts for violation of the very same statute he has been convicted of violating in the federal courts?

2. Should *Bartkus* v. *Illinois,* 359 U. S. 121, 3 L. Ed. 2d 648, 795 S. Ct. 676 (1959) be expressly overruled?

Constitutional Provisions and Statutes Involved

U. S. Const., Amend. V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ."

U. S. Const., Amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

18 U.S.C. § 1952:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

* * *

"(3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in [subparagraph] . . . (3), shall be fined not more than five years, or both.

"(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

• • •

N.J.S. 2A:93-6:

"Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or of any public authority, is guilty of a misdemeanor."

Statement of the Case

Petitioner Karl T. Feldman was indicted in January, 1967 by a federal grand jury in Newark, New Jersey. After lengthy pre-trial discovery including testimonial hearings, the trial commenced in October, 1968 and continued for ten weeks. After four and one-half days of deliberation the jury found Mr. Feldman not guilty of seven substantive counts, guilty on two conspiracy counts.

On June 27, 1969 petitioner was sentenced to imprisonment for one year and one day and in addition was fined

the sum of $20,000.00. The imprisonment portion was suspended by the Court and a probationary period of five years was substituted. Petitioner appealed to the Third Circuit Court of Appeals and the conviction was reversed on the grounds that the federal indictment was based upon an improperly impaneled jury. The United States petitioned the Third Circuit for an *en banc* rehearing and the matter is still pending.

On February 3, 1969 an indictment was returned by the Grand Jurors of the County of Middlesex. This indictment is the subject of this petition and patently recites the same facts and circumstances set forth in the federal proceeding. The statute which underlies both prosecutions is a New Jersey criminal (misdemeanor) statute, namely, N.J.S. 2A:93-6.

Defendant Feldman as well as the other defendants similarly situated moved before the trial court to dismiss the indictment on the grounds that state prosecution violates the constitutional prohibition against placing a person twice in jeopardy. The motion was denied in an oral opinion delivered by the Court and an order was subsequently entered thereon.

The state indictment alleges the same facts, circumstances, overt acts and participants as were contained in the federal grand jury indictments. The language in both indictments is practically identical except for the fact that the State of New Jersey was precluded from alleging two substantive counts which had been charged in the federal indictment due to the expiration of the statute of limitation.

This petition is directed principally to the fact that the instant indictment not only contains the same factual pattern and participants but, more importantly, illustrates

that the federal indictment and the state indictment allege but one offense. An appreciation of the validity of this contention necessitates an examination of the federal proceedings which have preceded this indictment.

The federal indictment alleged violation of 18 U.S.C. §1952. That section in its pertinent part reads as follows:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to
>
> • • •
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.
>
> (b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery or arson in violation of the laws of the state in which committed or of the United States."

The particular unlawful activity which the government referred to was a purported violation of N.J.S. 2A:93-6. The seven substantive counts in the federal indictment were based upon alleged separate payments in violation of this New Jersey statute. The two conspiracy counts alleged illicit agreements to make payments in violation of the same statute.

The federal trial was concerned directly with the interpretation and applicability of New Jersey law (N.J.S. 2A:93-6) and the major part of the trial was devoted to this application. The state prosecution can only be a complete repeat of the very evidence, witnesses and issues already made dispositive in the federal prosecution. Nevertheless the State of New Jersey seeks to move

the instant indictment against the defendant asserting the theory of dual sovereignty relying upon *Bartkus* v. *Illinois,* 359 U. S. 121 (1959). Indeed the State seeks to prosecute for not only the counts of which petitioner was convicted but on the counts of which he was acquitted.

Petitioner has sought in vain relief from the Superior Court, Appellate Division of New Jersey as well as the Supreme Court of New Jersey.

Application by petitioner for a stay of state proceedings pending the filing of their petition was presented to Mr. Justice Brennan as Circuit Justice. Petition for a stay was denied on April 23, 1971.

Reasons for Granting the Writ

The Supreme Court of New Jersey after presentation of briefs, full oral argument and court imposed hiatus of fourteen months, denied petitioner's motion to dismiss the indictment on the grounds of double jeopardy. This ruling effectively pronounces that defendant Feldman must, some five years after the original federal indictment, undergo the rigors of the state court trial for the same offense.

The state trial court relied upon this Court's holding in *Bartkus* v. *Illinois,* 359 U. S. 121 (1959) as affording authority for such a torturous effect. Since the time *Bartkus, supra,* was decided by a divided court, the state of law has evolved measurably. This evolution has led at least one state appellate court to note that this court's subsequent ruling in *Benton* v. *Maryland,* 359 U. S. 784 (1969) renders *Bartkus* "so enfeebled as to lack all binding force." *State* v. *Fletcher,* 22 O. App. 2d 83, 259 N. E. 2d 146 (Ct. App. 1970). The latter court dismissed the dual sovereignty concept as an "abstraction" prophesying:

> ". . . it is more than doubtful that the Supreme Court of this united country will hold, or should hold, that one of the blessings of freedom insured by the balancing of state and federal power is a permissible form of double jeopardy protected by federalism. Cf. Frankfurter, J. in Bartkus." 259 N. E. 2d 153, 154.

This case presents to this Court the most precise and clear instance of double jeopardy pursuant to the dual sovereignty theory and presents a unique opportunity for this Court to make a definitive pronouncement on this most important constitutional guarantee.

POINT I

A person may not be prosecuted in the state courts for violation of the very same statute he has been convicted of violating in the federal courts.

It has been a recognized principle of law for more than 150 years that there cannot be a second trial for a violation of the very statute whose violation by the same conduct has previously been tried in the courts of another government. The Supreme Court's decision in *Bartkus* v. *Illinois*, 359 U. S. 121, 3 L. ed. 2d 648, 795 S. Ct. 676 (1959), recognized the long standing principle of *Houston* v. *Moore*, 5 Wheat. 1, stating unequivocally:

> "Houston v. Moore can be cited only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the Courts of another government, empowered to try it."

This principle bars a second indictment of defendant Feldman for a violation of N.J.S. 2A:93-6 in the state courts.

The federal statute, 18 U.S.C. §1952, is totally dependent on a violation of the state statute. Without a violation of the state statute there can be no federal violation. *A fortiori* any conviction under the federal statute is for a violation of the state statute, and consequently, is "for a violation of the very statute whose violation by the same conduct has already been tried." *Houston* v. *Moore,* 5 Wheat. 1, at 35.

Since violation of the state statute is the sole legal basis for violation of the federal statute, the state prosecution must be a duplication of the federal prosecution. The state indictment is, in fact, a carbon copy of the federal indictment and seeks to prosecute for the violation of the very statute under which Karl Feldman has been convicted and sentenced in the federal prosecution. There can be no clearer violation of the double jeopardy provisions of the Constitutions of the United States and State of New Jersey.

Where the state and federal governments each pass legislation making specific acts crimes it has been held that the single commission of the specific acts violates the express legislation of each. Upon such reasoning the Supreme Court in *United States* v. *Lanza,* 260 U. S. 379 (1922) held that the Volstead Act, a national prohibition statute did not in any way impair the right of each state to enact and enforce its own prohibition laws (either more stringent or more lenient). Each sovereign defined its own law—each sovereign prosecuted offenses of that law.

Bartkus v. *Illinois, supra,* was a five to four decision, written by Justice Frankfurter. In *Bartkus,* the Supreme Court upheld a state robbery conviction which had been

preceded by a federal prosecution and acquittal of the same defendant based upon a federal statute, declaring robberies of federally insured banking institutions to be a federal offense. The Court in *Bartkus,* rationalized that where each sovereign had a separate and distinct *interest* to protect each could legislate and enforce its own law even if the same acts constituted a violation of the law of both sovereignties. Implicit in this holding is the determination that each sovereign is acting independently in defining a crime which is inimical to the interest of that sovereign.

Since the federal statute under which Karl Feldman was prosecuted does not determine "what shall be an offense against its peace and dignity" but rather relies upon New Jersey to make that determination, the federal government is clearly not "exercising its own sovereignty," but, unquestionably, "that of another." *United States* v. *Lanza, supra.*

When one sovereign makes it a crime to commit an offense against another sovereign, the object of such a statute is to further protect the interests of the primary law maker—in this case the State of New Jersey. There is no federal offense which is independent of the New Jersey offense.

It is submitted that the statute does not define a separate and distinct crime against the United States. The use of the commerce clause to obtain federal jurisdiction is purely and simply an extension of the federal arm of protection to the state. The federal government investigates and prosecutes not in "frustration of either the national or state policy and law enforcement," *State* v. *Cooper,* 54 N. J. 330 (1969) but in furtherance of the general welfare of both.

Petitioner Karl T. Feldman is thus being placed twice in jeopardy for violation of the same statute contrary to established principles of justice, aside from the continued validity of *Bartkus* v. *Illinois, supra.* The particular factual circumstances of this case warrants a reversal of the convictions for these reasons.

POINT II

Bartkus v. Illinois, 359 U. S. 121 (1959) should be expressly overruled.

Analysis of any legal support for the indictment at bar must start and end with consideration of the continued validity of *Bartkus* v. *Illinois,* 359 U. S. 121, 3 L. ed. 2d 648, 79 S. Ct. 676 (1959). A bare majority in *Bartkus* held that dual sovereignty, state and federal, justified submitting criminal defendants to successive trials, state and federal, for the same factual offense. Indeed the highly abstract theory of dual sovereignty provided the only support for that decision.

The course of decisional law emanating from this Court since *Bartkus* was decided has given clear indication that the decision in *Bartkus* would no longer be followed and that highly technical concepts of federalism will not be utilized to the detriment of an individual accused. The foregoing proposition constitutes the principal theme on which this argument will focus.

Bartkus was decided in 1959. It was decided in a context significantly different from the one which obtains at the present time. Thus, in 1959 the double jeopardy clause of the Federal Constitution had not yet been made applicable to the States through the agency of the Four-

teenth Amendment due process clause of that Constitution. Under that view of due process, the U. S. Supreme Court would and did tolerate successive new trials of the same defendant for the same factual offense. Deference to state criminal process was clearly the prevailing judicial philosophy. That same philosophy was exemplified in cases no longer with us. See for example, *Brown* v. *Walker,* 161 U. S. 591, 606, 40 L. ed. 819, 824; *United States* v. *Murdock,* 284 U. S. 141 (1931); *Feldman* v. *United States,* 322 U. S. 487 (1924); *Knapp* v. *Schweitzer,* 357 U. S. 371, 2 L. ed. 2d 1393 (1958). Each of the foregoing cases clearly found the federal structure as distinct and separate from that of the state judicial structure.

Thus in the realm of self incrimination and in the related area of immunity from prosecution for relinquishment of the privilege against self incrimination, the law prior to *Murphy* v. *Waterfront Commission of New York,* 378 U. S. 52 (1964) permitted the use of incriminating testimony obtained on a promise of immunity to be used against the witness in jurisdictions rather than the one affording him immunity. The immunity he was given extended only to prosecutions emanating from the compelling state. The process was known as "whipsawing". Apparently, the fact that the incriminating testimony thus extracted from a witness on a promise of immunity could be used as the basis for prosecution in another jurisdiction was of no concern to the compelling jurisdiction. The attitude again was one of deference, viewing other jurisdictions as separate and entirely apart from the jurisdiction compelling testimony and granting immunity. This Court in *United States* v. *Feldman* sanctioned this practice. See also *Knapp* v. *Schweitzer,* 357 U. S. 371, 2 L. ed. 2d 1393, a decision written by Justice Frankfurter which was overruled in *Murphy* v. *Waterfront Commis-*

sion of New York, supra. The *Feldman* and *Knapp* cases epitomized the dual sovereign concept when utilized to the detriment of a witness supposedly possessed of fundamental constitutional rights. It represented a triumph of abstract formalism over a realistic appreciation of an individual's constitutional prerogative. With the overruling of the *Knapp* and *Feldman* cases, the prevalence of such attitudes ended. This change was marked first by a groundbreaking decision that the Fifth Amendment self-incrimination privilege was applicable to the states in the case of *Malloy* v. *Patrick J. Hogan,* 378 U. S. 1, 12 L. ed. 2d 653 (1964), a case immediately followed textually by the case of *Murphy* v. *Waterfront Commission of New York, supra.*

The same movement toward practical considerations can be observed in yet another area of constitutional criminal law, that involving evolution of the Fourth Amendment guarantee in its application to the states. It was not until 1949 in the case of *Wolf* v. *Colorado,* 338 U. S. 25, 93 L. ed. 1782 (1949), that the United States Supreme Court held the Fourth Amendment guarantee applicable and binding upon the states, although that same Court refused to enforce the rule excluding illegally seized evidence from use by state court tribunals. It took approximately ten years for this Court to revise its thinking in this area and to move again in the direction of more direct guidelines for criminal procedures by forbidding use by the states of illegally seized evidence in state prosecutions. *Mapp* v. *Ohio,* 367 U. S. 643, 6 L. ed. 2d 1081 (1961). Again, *Mapp* discloses the same evolution in the attitude of this Court starting with the attitude of judicial silence to state criminal procedures, viewing states as truly sovereign and independent entities in this area, and ending with an attitude consistent with a more di-

rect interference with state criminal procedures mandated by decisions such as *Mapp* v. *Ohio*.

Clearly in requiring a state to adhere to federally guaranteed privileges, this Court was slowly eroding the "sovereign" barriers between federal and state criminal law. Under this approach, criminal procedure in both the federal and state realm were identical in nature and it mattered not in which "sovereign" entity the prosecution was instituted or pursued. The rights remained the same under this new approach which mandated direct interference by the federal government in state criminal procedures to insure such identity.

In *Benton* v. *Maryland*, 395 U. S. 784 (1969), the double jeopardy clause of the federal constitution was made applicable to and binding upon the states and in so doing overruled the landmark case of *Palko* v. *Commissioner*, 302 U. S. 319 (1937).

Benton mandates a state to apply federal standards in determining when and if jeopardy attaches and when a plea of double jeopardy is to be honored. It does more than that, however. The case of *Benton* v. *Maryland*, provides another step in undermining a view of a form of federalism which has as a necessary consequence a violation of individual rights which could not be accomplished in its absence. See also *Waller* v. *Florida*, 397 U. S. 387 (1970).

It is submitted that the future of the "double sovereignty" concept in the area of double jeopardy is parallel to the evolution of the law in the two fields previously described, that of self incrimination and Fourth Amendment guarantees. *Benton* v. *Maryland, supra* provides the first step in eradicating the "sovereign" boundaries between state and federal jurisdictions in the area of double jeop-

ardy and it is submitted from this time forward federal law will regard state and federal jurisdictions *as one* for the purpose of implementing this basic and fundamental guarantee against successive prosecutions and retrials.

The new attitude has already, however, found expression in the dissenting opinion of Justice Black in *Bartkus v. Illinois,* a dissent concurred in by Justices Brennan, Douglas and Warren. In that dissent, Justice Black's attention was not for a moment diverted from the rights of the criminal accused by any considerations of abstract federalism. Said Justice Black:

> "The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct." 3 L. ed. 2d 707-708.

Here is clear recognition of the situation of a criminal accused forced to a re-trial for the same conduct for which he was previously tried by another Sovereign. Forbidding re-trial in such circumstances can have no adverse effect upon valid federalism particularly in an area in which direct interference by federal law in state criminal procedures has been mandated upon countless occasions

by this very court in recent years. Indeed, the fiction of "dual sovereignty" has been all but obliterated in other areas of constitutionally guaranteed rights. See also *Duncan* v. *Louisiana,* 391 U. S. 145, 20 L. ed. 2d 491 (1968). There would appear to be no good reason why such conceptualism should continue to obtain with respect to this one federally guaranteed right against double jeopardy, a right described by Justice Black as being part of all advanced systems of law and as one of those universal principles of reason, justice and conscience. Neither of the two so-called sovereigns can undertake successive prosecutions for the same offense within their own jurisdictions. It seems unlikely in light of recent developments in this area of law that because one is undertaken by the federal government and the other by the state, successive retrials should therefore be tolerated based on abstract principles.

Although dual sovereignty constitutes the sole justification for the Court's holding in *Bartkus* v. *Illinois,* Justice Frankfurter rationalized the result with the help of *Palko* v. *Commissioner, supra,* a decision which Justice Frankfurter noted "especially commends itself" and noted the frequency of its citation. The demise of the reasoning in *Bartkus* is demonstrated by the fact that this landmark case has been overruled certainly insofar as it affects double jeopardy in its application to the states. That circumstance alone should warrant re-examination of the basis for the decision in *Bartkus* and re-examination of the result permitted in that and subsequent cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition of Karl T. Feldman for a writ of certiorari be granted.

Respectfully submitted,

ADRIAN M. FOLEY, JR.
Counsel for Petitioner, Feldman
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24 Commerce Street
Newark, New Jersey 07102

KENNETH F. KUNZMAN,
On the Petition

Dated: June 21, 1971
Newark, N. J.

APPENDIX

Notice of Denial of Application for Stay by the Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D. C. 20543

E. ROBERT SEAVER
Clerk of the Court

April 23, 1971

Adrian M. Foley, Jr., Esq.
Federal Trust Building
24 Commerce Street
Newark, New Jersey 07102

RE: KARL T. FELDMAN v. NEW JERSEY
October Term, 1970

Dear Mr. Foley:

Your application for stay and the opposition thereto in the above-captioned cause were presented to Mr. Justice Brennan, who has today denied such application.

Very truly yours,

E. ROBERT SEAVER, Clerk
By ROBERT N. BOYER
Robert N. Boyer
Assistant

RNB:jmh

cc: The Honorable George F. Kugler, Jr.
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625

Order of Supreme Court of New Jersey Denying Stay

(Filed—April 7, 1971)

SUPREME COURT OF NEW JERSEY

M-212 SEPTEMBER TERM 1970

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

WALTER ZIRPOLO,

Defendant-Appellant.

This matter having been duly presented to the Court, it is Ordered that motion is denied but stay is granted until May 17, 1971 on condition that application for further say is filed with the Clerk of the United States Supreme Court within 10 days from date hereof.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 7th day of April, 1971.

IRVING B. ZEICHNER
Acting Clerk

Order of Supreme Court of New Jersey Denying Leave to Appeal

(Filed—March 22, 1970)

SUPREME COURT OF NEW JERSEY

M-168 SEPTEMBER TERM, 1969

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

WALTER ZIRPOLO, *et al.*,

Defendants-Appellants.

KARL T. FELDMAN

This matter having been duly presented to the Court, it is Ordered that motion for Leave to Appeal is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this twenty-second day of March, 1971.

IRVING B. ZEICHNER
Acting Clerk

Order of Appellate Division of Superior Court Denying Leave to Appeal

(Filed—January 7, 1970)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-95-69

MOTION NO. M-346-69

BEFORE PART D

THE STATE OF NEW JERSEY

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE CO., KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORP., BECHTEL CORP., GATES CONSTRUCTION CORP., GATES EQUIPMENT CORP.,

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Moving Papers Filed December 23, 1969

Date Submitted to Court January 5, 1970

Date Decided January 6, 1970

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Motion for Leave to Appeal Denied

/s/ VICTOR S. KILKENNY P. J. A. D.

Order of Appellate Division of Superior Court Denying Leave to Appeal

Witness, the Honorable Victor S. Kilkenny, Presiding Judge of Part D, Superior Court of New Jersey, Appellate Division, this 6th day of January 1970.

MORTIMER S. NEWMAN, JR.
Clerk of the Superior Court

Order of Law Division of Superior Court

(Filed—December 8, 1969)

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY—LAW DIVISION
(CRIMINAL)
Nos. 69-187, 188, 190

THE STATE OF NEW JERSEY,

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORPORATION, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT CORPORATION,

Defendants.

This matter having been opened to the Court by various counsel representing all of the afore-mentioned defendants except Walter Zirpolo, and the State having been represented by Edward J. Dolan, Prosecutor of Middlesex County (J. Norris Harding, Assistant Prosecutor, appearing), and the Court having had an opportunity to consider the briefs and affidavits submitted as well as the oral arguments presented;

It is, on this eighth day of December, 1969, ORDERED and ADJUDGED that the motions made by respective coun-

sel for all the defendants except defendant Walter Zirpolo, for dismissal of the above indictments, based upon double jeopardy and/or collateral estoppel, be and the same are hereby dismissed for the reasons fully stated in the court's oral opinion delivered in open court on October 31, 1969, as by the record will more fully appear.

LEON GEROFSKY, A. J. S. C.

I hereby consent to the form of the within Order.

WILENTZ, GOLDMAN & SPITZER
Attorneys for Colonial Pipeline Company
By WARREN W. WILENTZ

TOOLAN, ROMOND & BURGESS
Attorneys for Robert E. Jacks
By JOHN E. TOOLAN

SHANLEY & FISHER
Attorneys for Bechtel Corporation
By THOMAS CAMPION

BROWER, BRILL & GANGEL
Attorneys for Rowland Tompkins Corporation
By JOSEPH E. BRILL

PAUL, WEISS, GOLDBERG, RIFKIND, WHARTON & GARRISON
Attorneys for Ben D. Leuty
By SIMON H. RIFKIND

PINDAR, MCELROY, CONNELL, FOLEY & GEISER
Attorneys for Karl T. Feldman
By ADRIAN FOLEY

VAN RIPER, BELMONT & VILLANUEVA
Attorneys for Gates Equipment Corp. and Gates Construction Corp.
By WALTER VAN RIPER

Oral Decision of Gerofsky, A. J. S. C. (October 31, 1969)

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY—LAW DIVISION
(CRIMINAL)
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THE STATE OF NEW JERSEY,

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORPORATION, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT CORPORATION,

Defendants.

Middlesex County Court House
New Brunswick, New Jersey
October 31, 1969

Before:

HONORABLE LEON GEROFSKY, A. J. S. C.

Appearances:

EDWARD J. DOLAN, Prosecutor
By J. NORRIS HARDING, Assistant Prosecutor
For the State.

TOOLAN, ROMOND & BURGESS, ESQS.
By ARTHUR W. BURGESS, ESQ.,
For Defendant Jacks.

Oral Decision of Gerofsky, A. J. S. C.
(October 31, 1969)

WILENTZ, GOLDMAN & SPITZER, ESQS.
By WARREN W. WILENTZ, ESQ.,
For Defendant Colonial Pipeline.

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON
By SIMON H. RIFKIND, ESQ.,
For Defendant Leuty.

PINDAR, MCELROY, CONNELL, FOLEY &
GEISER, ESQS.
By ADRIAN M. FOLEY, JR., ESQ.,
For Defendant Feldman.

SHANLEY & FISHER, ESQS.
By THOMAS F. CAMPION, ESQ.,
For Defendant Bechtel Corporation.

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(2)* The Court: Gentlemen, I have listened to all the argument here, after having devoted much time during the summer and since then to the briefs filed in this matter, and I am ready to call it. As I say, all of you rely upon your brief, and I have read them, studied them, familiarized myself with all of the authorities recited therein.

The defendants here, other than the defendant, Zirpolo, have moved this Court for an order dismissing the in-

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

dictments against them on the ground that trial in this Court would place them twice in jeopardy, and on the additional ground, raised by defendant, Leuty, that the State is collaterally estopped from prosecuting them. Today Leuty suggests an additional ground, a further ground that the Court should exercise supervisory power to bring to a halt this prosecution. That, though not specifically briefed, is summed up by my observation that it constitutes nothing more than that this Court should let its heart rule its head.

The defendants were first indicted in the United States District Court of New Jersey. They were charged, in many counts, with conspiring to violate and violating 18 U.S.C. code section 1952 by using or causing others to use facilities in interstate commerce to promote, manage, establish, carry on and facilitate unlawful activity, to (3) wit, violations of New Jersey's bribery statute, N.J.S. 2A:93-6. A trial was held and various judgments of convictions and acquittal were entered on jury verdicts. The judgments of conviction are presently under appeal.

The Middlesex County Grand Jury subsequently indicted the same defendants. In all essential respects, save the loss of some counts through passage of time, the State indictments charge the defendants with unlawful conduct arising out of the same facts. The only substantive difference is that the State indictments do not charge that the conduct of the defendants was interstate.

The defendant, Jacks, has also moved for dismissal of indictments in which he alone is charged with extortion and misconduct in public office. He has not submitted

a brief and is apparently relying on the briefs of other counsel. I assume that his position, for the purposes of this motion, is similar to that of the other defendants; however, any argument offered by the other defendants regarding the similarity of identity of offenses charged in the State and Federal indictments cannot serve any useful purpose here.

I turn to the argument that the indictments must be dismissed on the ground that trial in this Court would place them twice in jeopardy. The controlling authority on the issue of consecutive federal and state prosecutions (4) as placing a defendant twice in jeopardy, on both federal and state constitutional levels, is *State* v. *Cooper,* 54 New Jersey 330 (1969). In that case the New Jersey Supreme Court upheld prosecution of the defendant under both federal and state weapons statutes which were almost identical. In reaffirming the "dual sovereignty" theory announced in *Bartkus* v. *Illinois,* 359 U. S. 121, and other citations, the Court pointed out the ideological differences between the federal government and some of the states in determining the gravity of various criminal offenses and the frustration to national or state law enforcement policy which could result from a prohibition of a second trial by the other sovereign. It concluded that a subsequent prosecution by the state did not violate the U. S. Constitution, nor could the Court find a violation of the N. J. Constitutional provision for the same reasons.

Cooper would appear to be conclusive on the issue before this Court since a "dual sovereignty" rationale cer-

tainly would apply to a federal interest in the stream of interstate commerce and a separate and distinct state interest in punishing law-breakers within its borders.

But defendants mount several attacks on *Cooper*.

First, defendants seem to imply that the New Jersey Supreme Court would not have decided *Cooper* the way it did had it done some additional research, and they urge this (5) Court to correct this oversight and reject the "dual sovereignty" theory since it has been "eroded". To sustain this contention, defendants cite several United States Supreme Court cases in which what they conveniently call the "dual sovereignty" theory was "rejected". *Rea* v. *U. S.*, 350 U. S. 214 (1956); *Elkins* v. *U. S.*, 364 U. S. 206 (1960) and *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964). But these decisions represent only the application of the doctrine as it applies to the kind of evidence used in consecutive state-federal or federal-state prosecutions, not, as defendants would have it used here, to prevent a subsequent prosecution altogether.

Defendants next claim that, even if *Cooper* was correctly decided, it is distinguishable in that the federal statute there was designed to protect a matter of special federal concern, that is, the security of the national banking system and makes no reference to state law, while the state statute was designed to protect a distinctly different state concern, that is, protection of its citizens from dangerous weapons. However, the federal statute under which defendants were indicted here also protects a distinctly federal interest, that is, freeing interstate commerce from devices used to violate a law, the fact that

the law violated was a state law is of secondary importance, whereas the state law protects (6) citizens from the corruption of their government through bribery of public servants.

Nor does the fact that the *Cooper* court was concerned with an application for post-conviction relief make its decision any less binding on this Court since it cannot be presumed, despite defendants' suggestions, that the New Jersey Supreme Court would have applied two different standards on such an important constitutional issue in the absence of some clear indication to the contrary.

Having demonstrated why the dual sovereignty doctrine should no longer be adhered to, defendants go on to suggest that there is ample precedent for a state court's rejection of the United States Supreme Court decisions before they are expressly overruled by the highest court of the land. To soothe any apprehension this Court might have in taking so bold a step, defendants cite several state court decisions which had anticipated later Supreme Court rulings, and specifically, an opinion by an Ohio trial court in *State* v. *Fletcher*, 15 M. 211, 240 N.E. 2d 905 (1958), which found double jeopardy in a situation similar to the case at bar. Defendants fail to note, however, as did the court in *Cooper, supra,* 338, that:

> "* * * As stated in *Bartkus, supra,* of the twenty-eight states which have considered the validity of successive state and federal (7) prosecutions as against a challenge of violation of either a state constitutional double-jeopardy provision or a common-law evidentiary rule of *autrefois acquit* and

> *autrefois convict,* twenty-seven have refused to rule that the second prosecution was or would be barred." Citations.

Suffice it to say that even if this Court agreed with defendants' argument for the rejection of the "dual sovereignty" theory, it would hardly be propitious to fly in the face of a recent decision squarely on point by the highest court of this state on such dubious precedent.

Putting aside all considerations of double jeopardy, defendant Leuty next contends that the state prosecution here is barred by collateral estoppel, a somewhat nebulous offshoot of *res judicata* used in many criminal cases as a supplement to double jeopardy.

Even assuming, however, that the two prosecutions here present sufficient identity of issues and that no additional evidence could be pressed at the subsequent state prosecution, application of the doctrine of collateral estoppel still requires, as Leuty concedes, at least an identity of interests, if not a strict identity of parties. And if this Court accepts the "dual sovereignty" theory, as it is compelled to do by *Cooper, supra,* it (8) becomes immediately apparent that not only are the parties different, but the interests of each are not identical, the state's interest, therefore not being fully protected in the prior federal prosecution, thus precluding the operation of the collateral estoppel rationale.

State v. *Cormier,* 46 N. J. 494, 505 (1966), on which Leuty relies, cites strict identity of parties as a prerequisite to the operation of the doctrine, and indeed that case involved two successive prosecutions by the same sover-

eign, the state. Nor do the other cases which Leuty cites, all civil, support an extension of the doctrine to the situation *sub judice,* where two different sovereigns seek to vindicate separate policies underlying their separate penal laws. Rather, the Court looks to the more direct authority of *Ferina* v. *U. S.*, 340 F. 2d 837 (8th Cir. 1965). There, the Court expressly declined to use either double jeopardy, or *res judicata* to bar a federal prosecution for obstructing justice following a state acquittal for a felonious assault, even though both charges arose out of the same activity, since the offenses had been committed against two different sovereigns.

In conclusion, this Court is convinced that the result of the granting of defendants' motion at this time would be a blow to *stare decisis* and the entire state-federal dichotomous system of criminal justice which this (9) Court has neither the authority nor the inclination to strike.

The Court, finding no merit in any of defendants' arguments, hereby denies all motions to quash the indictments.

Counsel will submit an appropriate order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~Nos. 1832, 1852, 1853, 1854, 1862~~

70-287, 70-307, 70-308, 70-317

ROBERT E. JACKS,
Petitioner in No. 1832,

BECHTEL CORPORATION,
Petitioner in No. 1852,

KARL T. FELDMAN,
Petitioner in No. 1853,

COLONIAL PIPELINE COMPANY,
Petitioner in No. 1854,

BEN D. LEUTY,
Petitioner in No. 1862,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petitions for Certiorari to the Superior Court of New Jersey, Middlesex County

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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IN THE

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Nos. 1832, 1852, 1853, 1854, 1862

ROBERT E. JACKS,
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vs.

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Respondent.

On Petitions for Certiorari to the Superior Court of New Jersey, Middlesex County

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondent, State of New Jersey, respectfully prays that writs of certiorari sought in the above-captioned pe-

titions to review the interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, entered December 8, 1969 denying motions of all petitioners to dismiss pending indictments, be denied. Inasmuch as these cases arise out of a single series of transactions and largely involve identical issues of law, this brief is offered as a consolidated response to all pending petitions.

Counter-Statement of Jurisdiction

Respondent denies that this Court possesses jurisdiction under 28 U.S.C. §1257 (3) to consider the above-named matter on petition for certiorari.

The theory upon which all petitioners assert the jurisdiction of this Court, when applied to the facts of the instant cases, does not project the requisite "final order or decree" upon which such jurisdiction must be founded. In essence, petitioners say that if this Court ultimately finds that *Bartkus* v. *Illinois,* 359 U. S. 121 (1959), should be overruled, leaving aside the facts of these cases, jurisdiction is properly asserted, and a substantial federal question is thereby presented. But they do not cite a another instance where this Court has considered an interlocutory order of a state court as final for purposes of jurisdiction through a similar exercise in prospective overruling. *Cf. Carroll* v. *United States,* 354 U. S. 394, 403-405 (1957).

The more fundamental infirmity of the instant petitions is their common assumption that respondent's ability to try them on the pending state indictments is pivoted exclusively on the vitality of the *Bartkus* doctrine. It is demonstrated below that this notion must fall of its own weight, and with it any basis for present jurisdiction.

Moreover, before the dual sovereignty question can even be brought into focus, the trial court must have an adequate opportunity to develop the factual issues in these cases in light of the collateral estoppel principles articulated in *Ashe* v. *Swenson,* 397 U. S. 436 (1970). An application of those principles and stipulations of facts by the parties may make it evident that in trying petitioner, *Bartkus* need not be invoked at all to avoid collision with the general principles of double jeopardy, even upon counts which appear to parallel those upon which petitioners were acquitted in the federal courts.

In trying petitioners Jacks, Leuty and Feldman the trial court must focus upon the same facts embraced in the two all-encompassing conspiracy counts upon which they were initially convicted, but have hitherto escaped punishment.

Thus, even assuming *Bartkus* were no longer the law at this moment, and trial on the similar counts would be technically improper under the principles of collateral estoppel, trying petitioners upon such additional counts would itself involve no greater burden, anxiety or expense than trial limited to the all-embracing conspiracy charges; nor could it by itself constitute irreparable jury. *Younger* v. *Harris,* —— U. S. ——, 91 S. Ct. 746, 751 (1971). Even accepting petitioners' premise that *Bartkus* has been emasculated, trial on the added counts would amount to harmless error.

Likewise, given the present posture of these cases and the facts that *Bartkus* is the law at this moment, the dual sovereignty question will only become substantial and ripe for the Court's decision when it is presented in terms of respondent's ability to impose a punishment after the courts of New Jersey have passed upon it on

a full record. In every case which has served as a vehicle for re-examination of the double jeopardy clause in a state or inter-jurisdictional context, this Court has only considered such questions in terms of the possibility of punishment; e.g., *Bartkus* v. *Illinois, supra; Abbate* v. *United States,* 359 U. S. 187 (1959); *Benton* v. *Maryland,* 395 U. S. 784 (1969); *Ashe* v. *Swenson, supra.* On the other hand a procedure which allowed interlocutory assaults on governing precedents would be antiethical to any notion of comity and a grave hindrance to the administration of justice.

Hence, review at this juncture would be premature since the *Bartkus* question, which has real significance only in terms of punishment on the substantive counts must remain hypothetical until the possibility of such punishment becomes imminent.

Counter-Statement of Questions Presented

1. Are corporations within the protection of the Fifth Amendment guarantee that: "no person . . . shall be subject, for the same offense, to be twice put in jeopardy of life and limb . . ."?

2. May a state try a defendant under a valid state indictment after defendant's convictions on similar federal charges has been set aside at the instance of defendant without a showing of prejudice to defendant, upon a finding that the grand jury which returned the federal indictments was improperly selected?

3. Is a prosecution under N.J.S.A. 2A:93-6 (following an acquittal upon federal charges alleging violation of 18 U.S.C. §1952 based on an "intent" to facilitate or promote the violation of N.J.S.A. 2A:93-6 through interstate

means) barred under the principles of collateral estoppel lately set down in *Ashe* v. *Swenson, supra*?

4. Assuming the right of a state to try a defendant on several counts of an indictment including the all-embracing conspiracy counts is not dependent on the doctrine of dual sovereignty, should this Court before trial grant review to determine whether *Bartkus* v. *Illinois*, should be overruled in order to avoid the possibility that ultimately the right of the state to punish defendant upon a conviction on other counts might depend on the fact of the state's separate sovereignty?

Counter-Statement of the Case

From early in 1963 and through the end of 1964, petitioner, Colonial Pipeline Co. ("Colonial") a corporation of which petitioner Leuty was president, and petitioner Feldman was vice president, engaged in the construction of an interstate pipeline system terminating in New Jersey. Petitioner Bechtel Corporation ("Bechtel") was under contract with Colonial to perform some of the engineering and construction work on the project. Colonial's wished to establish a terminal facility for the system in Woodbridge, New Jersey, within the Port Reading section of the third ward in that township. During 1963, the third ward was represented on the Woodbridge township committee by petitioner Robert E. Jacks. On January 1, 1964, Jacks assumed the position of president and voting member of the Municipal Council of Woodbridge. Walter Zirpolo, at all times relevant to these cases served as mayor of Woodbridge and as a voting member of its planning board.

The terminal facility envisioned by Colonial involved the construction of 22 petroleum storage tanks for which

a building permit was required. Apparently, Colonial was aware of stiff opposition among the residents of the third ward to the project. Realizing that legitimate channels might be unavailing, Colonial solicited the assistance of Mayor Zirpolo in securing the permit. In order to complete the system, Colonial also was required to obtain easements from the City of Woodbridge to permit it to run the pipeline through township property to the projected terminal point. Colonial also sought Zirpolo's assistance in promoting the sale of the easements from the township to Colonial.

However, Zirpolo was not able to offer immediate assistance. An election was imminent (on November 3, 1963) and Zirpolo was a candidate for re-election. His associate Jacks was running for the council post. They both had promised their constituents that no new tanks would be built in the Port Reading area. Consequently Zirpolo informed Colonial that it would be more feasible politically to defer formal action on the permit and easements until after the election. In the interim the details of the plan were worked out between a representative of Colonial and Jacks acting on behalf of himself and Zirpolo.

Eventually the officers of Colonial including Leuty and Feldman accepted the plan as proposed by Zirpolo and Jacks. Two separate conspiracies were developed. The conspiracy to obtain the building permit assumed the following configuration: Colonial's officers agreed to a bribe of $50,000.00 to Zirpolo and Jacks in the guise of a campaign contribution to assure their assistance in the matter. The money was to come from Colonial's Atlanta office and be delivered in separate installments of $20,000.00, $15,000.00 and $15,000.00. Colonial officers, most

prominently Leuty and Feldman, enlisted the aid of one of their sub-contractors to transmit the payments to Zirpolo and Jacks in New Jersey. The first payment was to be made on the day following the election; the second payment was to be due at the time of the issuance of the building permit and the final payment was to be made after the certificate of occupancy had been issued to Colonial by the township. Respondent will seek to prove on trial that all of this came to pass.

Beginning in January of 1964, a second conspiracy was developed among Colonial's officers and Zirpolo and Jacks to obtain the desired easement. For their assistance in this matter, Zirpolo and Jacks were to receive the amount of $10,000.00 from Colonial. Leuty and Feldman and other Colonial officers in working out the details of this scheme and its eventual execution. This plan also came to fruition as will be proven at trial.

In February 1967, all of the petitioners, as well as several others, were indicted by a federal grand jury for various substantive violations of 18 U.S.C. §1952 and conspiracy to violate that act based on the foregoing transactions. The federal indictment charged all of the petitioners with the exception of Bechtel in seven substantive counts, alleging separate acts of unlawfully employing the facilities of interstate commerce to ". . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of . . . [and] unlawful activity . . . [i.e.] extortion, . . . [or] bribery in violation of the laws of the state in which committed or of the United States . . ." It is recited therein that the alleged wrongful use of interstate means was intended to facilitate the violation of N.J.S.A. 2A:93-6, a bribery statute, and other bribery laws, although the federal indictments do not charge that such New Jersey laws were thereby violated.

Also included in the federal indictments were two conspiracy counts relating first to the scheme developed to obtain the building permit and second, to the plan to procure the sale of the easements. Bechtel, unlike the other petitioners, was only charged with participating in the second conspiracy and in conduct designed to affect a payment to Jacks and Zirpolo in New Jersey, pursuant to that scheme.

On January 3, 1969, verdicts were returned on the federal indictments against all petitioners. Petitioner Colonial was found guilty on all counts and fined a total of $90,000.00; petitioners Leuty and Feldman were found guilty only on the two conspiracy counts; petitioner Bechtel was found guilty on both of the counts on which it had been indicted; petitioner Jacks was found guilty on both conspiracy counts and one substantive count.

The United States Court of Appeals for the Third Circuit set aside petitioners federal convictions on the ground that the method used in the district of New Jersey to impanel the grand jury which returned the federal indictments departed from the pertinent statutory standard and resulted in a systematic under-representation of women. However, in setting aside the convictions the court noted that there was no proof of prejudice to petitioners resulting from this improper practice. *United States* v. *Zirpolo, et al.*, —— F. 2d ——, Crim. Nos. 18,137-18,142, 3 Cir., Feb. 18, 1971 (Slip opinion, at 7-8). The Third Circuit on July 1, 1971, denied the petition of the United States for re-hearing *en banc* in these cases and the government has been required to reindict petitioners.

After the return of the federal indictments, the Middlesex County grand jury returned a series of indictments against petitioners relating to state violations arising out

of the same transactions which formed the basis of the federal indictments. Most of these charges allege violations of N.J.S.A. 2A:93-6, the bribery statute, whose violation was recited to be the intended object of the proscribed activity forming the basis of the federal indictments. Petitioners were also charged in various counts with aiding and abetting violations of N.J.S.A. 2A:93-6, as well as with two separate counts of conspiracy to violate this provision. Separate indictments were also returned against Jacks and Zirpolo, charging them with two conspiratorial and five substantive violations of N.J. S.A. 2A:105-1 which prohibits unlawful takings by public officers under color of office. A third state indictment was returned charging Jacks alone with five counts of common law misconduct in office in violation of N.J.S.A. 2A:85-1.

Petitioners applied before Mr. Justice Brennan for stay of the state proceedings pending the filing of petition for certiorari in this Court. After full review of petitioners' applications supported by briefs, which set forth the same arguments made in the pending petitions, as well as respondent's memorandum in opposition to the application, Mr. Justice Brennan denied such applications on April 23, 1971.

Reasons for Denying the Writ

Petitioners have portrayed all the pending cases as frontal assaults on the doctrine of *Bartkus* v. *Illinois,* 358 U. S. 121 (1959). Respondent will demonstrate that at best the *Bartkus* question is tangential in every one of these cases in their present postures and clearly insubstantial. In every case the threshhold question is respondent's ability to *try* the particular petitioner involved on

some basis and such ability does not rest on *Bartkus*. Respondent contends that at this juncture the Court is without jurisdiction in the pending cases, irrespective of whether at some later time respondent's ability to punish petitioners for some of the offenses alleged may depend upon the survival of the dual sovereignty concept. It at a later point in the proceedings, this question rises above a hypothetical concern and is decided adversely to petitioners by the courts of New Jersey, it might then and only then become ripe for review by this Court.

In support of respondent's contention that its present right to *try* petitioners is beyond challenge, it will demonstrate that: (a) the double jeopardy clause of the Fifth Amendment protects only natural persons and may not be availed of by the corporate petitioners, Bechtel and Colonial; (b) the statutes under which respondent seeks to try petitioners are conceptually distinct from 18 U.S.C. §1952 and require the proof of wholly different acts in order to establish the violations in question; (c) trial of petitioners upon separate state indictments, following the setting aside upon motions of petitioners of their convictions on similar federal charges on the ground that the underlying federal indictments were technically defective is entirely consistent with the federal standards set forth in *Ewell* v. *U. S.*, 383 U. S. 116, (1966) and applied to the states under *Benton* v. *Maryland, supra,* and any erosion of the dual sovereignty concept must serve to reinforce this conclusion; (d) trial of all petitioners, particularly petitioner Jacks, who acknowledges that the federal substantive charges against him failed only because there was no proof of interstate activity on his part, is fully consistent with the collateral estoppel doctrine of *Ashe* v. *Swenson, supra,* even under the principles urged on this Court by Justice Brennan, *Id.,* 397 U. S., at 53, n.7.

POINT I

Respondent seeks to prosecute petitioners for violations of statutes that are conceptually distinct, and require different proofs from the violations under 18 U.S.C. §1952 for which they were tried.

Petitioners state that respondent is seeking to prosecute them a second time for violations of the same statute for which they have already been tried in the federal courts. Such representations are plainly inaccurate as a glance at the federal indictments reveals. (See Petitioner Leuty's Appendix "D").

The federal government attempted to prosecute petitioners for violating U.S.C. §1952. Like penal provisions generally, a violation of this statute is founded upon the merger of certain conduct with a certain intent. The conduct in question is described as ". . . [travelling] in interstate or foreign commerce or . . . [use of] any facility in interstate or foreign commerce. . . ." 18 U.S.C. §1952.

However, such acts are only punishable under 18 U.S.C. §1952 if they are undertaken with the "intent" to (inter alia):

> ". . . (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, or carrying on of any unlawful activity."

The "unlawful" "activity" that is the object of the accompanying intent may take one of several forms, to wit:

> (1) ". . . [a] business enterprise involving gambling, liquor on which the federal exise tax has

> not been paid, narcotics, or prostitution offenses in violation of the laws of the state in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which they are committed . . . or [extortion, bribery, or arson in violation of the laws] of the United States." 18 U.S.C. §1952(b)

The configuration of this statute is reminiscent of the common law crime of burglary which is also a product of the merger of a species of often-innocuous conduct with an intent to commit certain types of illegal acts. (i.e., felonies). The crime of burglary is, of course, conceptually distinct from whatever felony might ensue. The burglary and the felony remain separately punishable though they share and require proof of but a single intent.

To similar effect, it is obvious that Congress in passing 18 U.S.C. §1952 did not thereby intend to have that statute supplant every existing federal gambling, liquor, narcotics, prostitution, extortion, bribery, or arson statute then in force. But in the final analysis the petitioners' contentions reduce to an assertion that in enacting the Travel Act, 18 U.S.C. §1952, Congress vested the federal courts with pre-emptive jurisdiction in any case where the alleged violation of a state statute of the classes enumerated in 18 U.S.C. §1952 is touched by interstate activity. It should be self-evident that Congress did not intend this result, particularly where violation of a state rather than a federal law is concerned. To suppose otherwise would be at odds with the whole philosophy of federalism that undergirds our system of government.

Moreover, petitioners' notion is strongly belied by observations of this Court in *United States* v. *Nardello,* 393 U. S. 286 (1969). In *Nardello,* this Court found the purpose of the Travel Act was to supplement, not supplant the machinery available to local officials in combating crime. *Id.* 393 U. S. at 290. The Act was designed only as a means of reaching into those areas of wrongful conduct which could not be dealt with under state law. Its purpose, as illuminated in *Nardello,* was to close gaps that existed in both federal and State law enforcement schemes rather than as petitioners contend, to "backstop" or, more accurately, pre-empt local law enforcement. Petitioners do not point to a single case where prosecution under 18 U.S.C. §1952 has been held to bar simultaneous prosecution and conviction under the same federal indictment for commission of the substantive federal crime that the proscribed interstate activity was intended to promote or facilitate. *Cf. Gore* v. *United States,* 357 U. S. 386 (1958), *reh. den.* 358 U. S. 858. To suppose otherwise would do obvious violence to the clear intent of Congress.

While the violations charged in the various state indictments in the instant cases by-and-large charge the same intent (*mens re*) as the violations charged in the federal indictments, the acts proscribed thereunder are wholly distinct and separate from the acts which form the basis for the violations of 18 U.S.C. §1952 charged under the federal indictments. Just as in a prosecution for common law burglary, it is possible for one to commit burglary with the requisite felonious intent without being chargeable for the intended felony or, on the other hand, to be chargeable with the intended felony in a situation where the elements of common law burglary are not present (e.g., where the entry takes place in the day-

time), the federal law may be violated without the occurrence of a state violation, or vice versa. Of course, with regard to the violations of N.J.S.A. 2A:85-1 and N.J.S.A. 2A:105-1 for which the defendant Jacks was separately indicted, the requisite intent is not shared by the state violations charged and the federal violations for which Jacks was prosecuted.

In any event it is plain that the federal prosecution of these petitioners could implicate no more than the intent element of the violations of N.J.S.A. 2A:93-6 charged under the state indictments. Thus, as petitioner Leuty acknowledged in the lower court, even if the double jeopardy guarantee is to be applied in these cases, it must be applied in the form of collateral estoppel, not actual *res judicata*.

Ashe v. *Swenson, supra*, is a controlling authority in this area. The Court in *Ashe* stated the principles of collateral estoppel to be: ". . . simply that when an issue of ultimate facts has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any further law suit." *Id.* 397 U. S., at 443. Assuming, for argument's sake, that separate sovereignty is to have no force and federal and state governments must therefore be treated as the same party for purposes of collateral estoppel it still remains apparent in all these cases that: ". . . a rational jury [in the federal case] could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* 397 U. S., at 444 (footnote omitted). Indeed, petitioner Jacks candidly admits that he avoided conviction on several substantive charges only because of a lack of evidence concerning his involvement with interstate activities. The corporate petitioners, of course, were found guilty on all counts so that there

is no basis for contending that the State seeks reconsideration of any issue of ultimate fact with regard to either of them.

Petitioner Leuty however contends that although his acquittal on the substantive charges of the federal indictment was based upon a general verdict, the only factual question regarding his guilt in dispute there was that of *intent* to commit bribery. This contention is strongly belied by the federal jury's determination of guilt on the conspiracy counts which required the identical determination of intent. In any event, only the trial court would be in a position to make the pragmatic inquiry directed by *Ashe* as to the "sameness" of the evidence to be presented in the state prosecution.

It is interesting to note that even if this Court were to adopt the "same transaction test" urged by Mr. Justice Brennan in *Ashe* v. *Swenson, supra,* 397 U. S. at 448 *et seq.*, collateral estoppel would not bar the State prosecution. The federal courts have not tried these petitioners for violation of N.J.S.A. 2A:93-6. They lack jurisdiction to do so. Neither the federal court nor the state court has jurisdiction to try petitioners for all of the violations arising out of the transactions in question. As Mr. Justice Brennan noted, even the expansive view of the double jeopardy clause he would have adopted could not bar a second prosecution where no single court had jurisdiction of all the alleged crimes arising out of a single transaction. *Id.* 397 U. S., at 453, n. 7.

Thus, respondents submit that even if the dual sovereignty doctrine of *Bartkus* no longer held any force, prosecution of these defendants would be entirely compatable with the principles of double jeopardy relevant to these cases.

POINT II

Petitioners, Colonial and Bechtel are not protected by the Double Jeopardy Clause of the Fifth Amendment.

Two of the petitioners in these cases are multi-million dollar corporations. They have no standing to invoke the protection of the Double Jeopardy Clause of the Fifth Amendment which provides that:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

Plainly, a corporation, which is without "life or limb" was not intended to be protected by this provision. Even Mr. Justice Black on behalf of the dissenters in *Bartkus, supra,* made clear throughout his opinion that his conception of the protection afforded by the guarantee extended only to natural persons. (E.g., "people", *id.* at 151; "a man", *id.* at 155; "people", *id.* at 156; "a man", *id.* at 160; "the poor and the weak in our society, individuals without friends in high places"; and "a man", *id.* at 163). See also *Barton* v. *Maryland, supra.* (Opinion of Mr. Justice Marshall).

The notion that corporations have standing to invoke the double jeopardy clause appears to be unsupported by any authority other than some off-hand comments by a California district court. (*U. S.* v. *Armco Steel Corp.,* 252 F. Supp. 364, 368 (D. C. Cal. 1966)). Subsequently however, this Court held in *Campbell Painting Corp.* v. *Reid,* 392 U. S. 286 (1968) that the Fifth Amendment privilege against self-incrimination applies only to natural individuals. *Id.* 392 U. S. at 288, 20 L. Ed. 2d at 1097. Unlike the self-incrimination clause nothing in the double

jeopardy clause has any pertinence to non-natural persons. Clearly its protection is not available to a corporation. For this reason in addition to others, respondent respectfully submits that the petitions of Colonial and Bechtel must be denied.

POINT III

Trial of petitioners on counts similar to counts upon which they were convicted under an invalid federal indictment later set aside is consistent with the applicable federal standard of double jeopardy.

It is well established in federal law that a defendant can claim no former jeopardy after a judgment for conviction upon an invalid indictment has been set aside as a result of defendant's challenge to the indictment. *Ewell* v. *United States, supra,* 383 U. S. at 124; *Ball* v. *United States,* 163 U. S. 662, 672, 16 S. Ct. 1192, 1195 (1896). The doctrine of "continuing jeopardy", (e.g. *Price* v. *Georgia,* 398 U. S. 322 (1970); *Green* v. *United States,* 355 U. S. 184, 189 (1957), is inapposite where defendant has procured a reversal of conviction on the basis of the invalidity of the indictment (e.g., *Ewell, supra, Ball, supra,*) rather than on the basis of trial errors (e.g., *Price, supra, Green, supra*).

The foregoing conclusion is inescapable, in view of the illumination of the conceptual basis of *Ewell* provided by recent circuit decisions. In *United States* v. *Beard,* 414 F. 2d 1014 (3d Cir. 1969) the court found that a count in an indictment which failed to allege unlawful or fraudulent intent was a nullity. Based upon this determination the court citing in support *Ball, supra,* and *Ewell,*

supra, stated that: "The United States will be free to reindict and retry these defendants according to law." *Id.* 414 F. 2d at 1017. *United States* v. *Franke,* 409 F. 2d 958 (7 Cir. 1969) is to similar effect.

If, for purposes of the constitutional guarantee, no former jeopardy attached from trial and conviction on various counts of the invalid federal indictments, now quashed, *a fortiori,* prosecution under these counts cannot bar prosecution by the State under an indictment which includes similar counts. The holding of *Benton* v. *Maryland,* 395 U. S. 784 (1969), that the state and federal standards of double jeopardy are the same dictates this conclusion. Moreover, the thrust of petitioner's assault upon the dual sovereignty doctrine is that the federal and state governments should be regarded as one for purposes of the second trial. A contention that the State, after a defendants conviction and subsequent reversal of conviction under circumstances not amounting to former federal jeopardy, is barred from trying the defendant is therefore incompatible with this notion since the former must rest of course on the maintenance of formal distinctions between the prosecutorial agencies.

For the foregoing reasons, in addition to those stated in prior sections, it is respectfully submitted that respondent's ability to retry, if not punish, on every count, each of the petitioners is not dependent upon the dual sovereignty doctrine and is fully consistent with pertinent federal principles of double jeopardy.

POINT IV

Recent decisions of this Court have not undermined the dual sovereignty concept embodied in *Bartkus* v. *Illinois*.

Contrary to the view expressed by petitioners, *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964), in no respect represents a repudiation of the dual sovereignty concept articulated by the court a few years before *Bartkus*. Indeed, the configuration of the rule which emerged from *Murphy* was the direct result of the Court's punctilious recognition of the need to accomodate law enforcement interests of both the state and the federal sovereigns within its constitutional framework. *Id.* 378 U. S., at 79. More recently, in *Waller* v. *Florida*, 397 U. S. 387 (1970) the gravamen of the Court's decision was its determination that unlike the relationship between the states and the federal government, i.e., as separate sovereigns, a city is merely a subdivision of the state sovereign and cannot assert the prerogatives of separate sovereignty.

But even were *Bartkus* to lose some of its force, Mr. Justice Frankfurter's discussion of the effect of a bar on the states in bringing a second prosecution related to the federal prosecution would continue to be pertinent to the instant case. Mr. Justice Frankfurter pointed out that even in such a situation there must remain, for the trial court the knotty task ". . . of determining when the federal and state statutes are so much alike that a prosecution under the former bars a prosecution under the latter . . ." *Bartkus, supra*, 359 U. S. at 137.

Mr. Justice Frankfurter continued:

> "The proper solution of that problem frequently depends upon the gravamen of the state statute.

> It depends also upon an understanding of the scope of the bar that has been historically granted in the state to prevent successive state prosecutions. *Both of these problems are ones which the states are obviously more competent to handle than is this court." Ibid.* (emphasis supplied).

Likewise, respondent respectfully submits that this Court should not undertake such determination until the courts of New Jersey have had an adequate opportunity to make this judgment on a full record. Clearly at this juncture in the proceedings they have not had that opportunity.

CONCLUSION

For all of the foregoing reasons, respondent, State of New Jersey respectfully prays that the writs of certiorari sought in the above-named petitions pending before this Court not issue.

Respectfully submitted,

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